

## THE EXPORT CONTROL ACT OF 1949: EXTRATERRITORIAL ENFORCEMENT

PAUL H. SILVERSTONE †

*Export controls are enforced by means of a variety of sanctions, among them the denial of trading privileges, criminal prosecution, and the confiscation of goods illegally traded. But such sanctions, although they may deter violation of United States law, cannot bring back goods after they have passed into the domain of a foreign nation. This Article surveys the legal means available to prevent such goods from reaching their illegal destinations, and examines the defenses available to persons who, by acting in compliance with United States law, subject themselves to breach of contract suits in foreign courts.*

Legislative enactments affecting transactions which take place beyond the borders of the enacting nation inevitably raise unique and perplexing problems of enforcement. Since the power to apply sanctions is a function of sovereignty,<sup>1</sup> serious questions of policy and ethics, as well as of law, are bound to arise when one nation seeks to reach into the jurisdiction of another nation and dictate the legal consequences which are to be attached, by the courts of the nation having jurisdiction, to acts which occur there. Often the effect of such legislation is to produce situations where an act by a person is "legal" in his own country, where it is performed, and yet is within the purview of the legislation of a foreign state which makes it "illegal."

The Export Control Act of 1949<sup>2</sup> is an example of this type of legislation in that it renders subject to the regulations promulgated

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† Member of the New York Bar; A.B., 1953, Yale University; LL.B., 1956, Harvard University.

1. See STOWELL, *INTERNATIONAL LAW* 49 (1931).

2. 63 Stat. 7, 50 U.S.C. APP. §§2021-32 (1952). The 1949 legislation was intended to continue controls then in effect without substantive change. Controls were first authorized in 1940 in regard to munitions and similar materials essential to the defense effort, and extended in 1942 to all commodities. Act of July 2, 1940, ch. 508, § 6, 54 Stat. 714; Act of June 30, 1942, ch. 461, 56 Stat. 463. Always intended to be only temporary, the 1940 act was successively extended in 1944, 1945, 1946 and 1947. Act of July 1, 1944, ch. 360, 58 Stat. 671; Act of June 30, 1945, ch. 205, 59 Stat. 270; Act of May 23, 1946, ch. 269, 60 Stat. 215; Act of June 30, 1947, ch. 184, § 1, 61 Stat. 214; Second Decontrol Act of 1947, ch. 248, § 4, 61 Stat. 323. Scarcity of certain goods in the world markets made continuance of controls necessary in order to prevent a drain of such goods from our more plentiful supplies with its consequential inflationary trend. It was envisaged that remaining controls would soon disappear at the time of re-enactment in 1949. S. REP. NO. 31, 81st Cong., 1st Sess. 2-3 (1949). But national security and foreign policy, especially following the outbreak of the Korean war, were new and compelling reasons for extending the present act in 1951, 1953, 1956 and again in 1958. Act of May 16, 1951, ch. 83, 65 Stat. 43; Act of June 16, 1953, ch. 116, 67 Stat. 62; Act of June 29, 1956, ch. 473, § 1, 70 Stat. 407; Pub. L. No. 466, 72 Stat. 220 (U.S. Code Cong. & Ad. News (July 20, 1958)). See H.R. REP. NO. 318, 82d Cong., 1st Sess. (1951).

under it all persons wherever situated. Under its provisions exports of scarce materials are controlled both from the economic standpoint—short supply and the consequent inflationary effect of foreign demand; and the security standpoint—autarchy and self-sufficiency in strategic resources not available in sufficiently large quantities. These are both domestic policies aimed primarily at conditions within the United States. Controls are also directed at conditions outside the country as an instrument of foreign policy. This is exemplified by the restriction on export of certain strategic or military items to the Soviet bloc or to other countries which it is felt, if permitted, would be detrimental to the foreign policy program of this country.<sup>3</sup> This latter motive became so strong that it brought legislation directing the President to enlist the cooperation of other nations in enacting controls on trade with the Soviet bloc to parallel those of the United States. The benefits of the various economic and military aid programs were to be withheld from noncooperating nations.<sup>4</sup>

This Article will discuss the operation of the act with a view toward demonstrating its extraterritorial effects and examining attempts to gain compliance with its provisions. Attention will also be given to the perplexing situation in which an exporter, carrier, or American consignee, who, by complying with the mandates of the act and administrative regulations thereunder, breaches his contract with a third party. The question arises whether he may successfully raise the duty to comply with American law as a defense to a suit in a foreign forum for that breach.

## I. OPERATION OF THE EXPORT CONTROL ACT

The Export Control Act of 1949 is drawn in very broad terms, the President being authorized to "prohibit or curtail the exportation from the United States . . . of any articles . . . except under such rules as he shall prescribe."<sup>5</sup> Export controls are presently administered by the Commerce Department's Bureau of Foreign Commerce, the most recent of a series of agencies which have exercised this function. Originally these functions were in the Department of State.

Under the present arrangement all exportations of any kind from the United States are prohibited unless the Bureau has either issued a license or established a general license for such shipments.<sup>6</sup> General

3. Section 2, 63 Stat. 7 (1949), 50 U.S.C. APP. § 2022 (1952).

4. Mutual Defense Assistance Control Act of 1951 (Battle Act), ch. 575, 65 Stat. 644, 22 U.S.C. § 1611-13c (1952).

5. Section 3(a), 63 Stat. 7 (1949), 50 U.S.C. APP. § 2023(a) (1953).

6. 15 C.F.R. § 370.2 (1957) (all references to 15 C.F.R. are to the 1957 edition unless otherwise noted). This does not apply to shipments to Canada.

licenses have been established for the exportation of many types of commodities to certain destinations.<sup>7</sup> A validated license<sup>8</sup> is required for exportation of commodities grouped together in the regulations as the "Positive List."<sup>9</sup> Those exportations not falling within a general license category and not listed in the Positive List also require a validated license.<sup>10</sup>

Carriers are prohibited from delivering goods to destinations other than those listed in the license or in the exporter's declaration which is required for all exportations, and upon delivery of the goods must obtain from the recipient a bill of lading with the destination control statement<sup>11</sup> included. The consignee and the carrier are prohibited from diverting the goods described in the bill of lading from the named country or destination. The Bureau may order a carrier to return the shipment to the United States or unload it in bond at a port of call if it believes a violation of law is about to occur.<sup>12</sup>

### *Constitutionality*

Under the prevailing view engaging in export trade from the United States is a privilege and not a right. Regulation of the exportation of arms and other war materiel is inherent in the powers of the executive in its capacity to carry on the foreign relations of the United

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7. 15 C.F.R. § 371.1. No application is filed and no document is issued under a general license. A general license authorizing export to the Soviet bloc of certain listed commodities, mostly consumer goods, was set up in 1956, and further easing of controls on Soviet-American trade is predicted. 15 C.F.R. § 371.24 (Supp. 1958). See Wall St. J., Feb. 28, 1958, p. 1, col. 1. Controls on export to Poland were relaxed further on August 28, 1957. N.Y. Times, Aug. 29, 1957, p. 39, col. 3; see 22 Fed. Reg. 7277 (1957).

8. To obtain a validated license, the applicant must be an exporter subject to the jurisdiction of the United States. He must list the quantity, description, price and proposed end-use of the goods together with the names of all parties interested in the transaction. 15 C.F.R. § 372. Similar information is listed in the Shipper's Export Declaration, required for all exportations.

9. 15 C.F.R. §§ 372.3, 399.1. The Positive List contains both commodities which are of a highly strategic nature and those excessive export of which would cause domestic scarcity. However, the balance is very much on the side of the former. Only eight commodity categories were controlled for reasons of short supply in December 1955. SECRETARY OF COMMERCE, 34TH REPORT ON EXPORT CONTROL 24 (1956).

10. 15 C.F.R. § 372.3.

11. 15 C.F.R. § 379.10(c)(1) (Supp. 1958). Either of the following statements must appear: "These commodities licensed by the United States for ultimate destination (name of country). Diversion contrary to United States law prohibited." *Id.* § 379.10(c)(1)(i). "United States law prohibits disposition of these commodities to the Soviet bloc, Communist China, North Korea, Macao, Hong Kong or Communist controlled areas of Viet Nam and Laos, unless otherwise authorized by the United States." *Id.* § 379.10(c)(1)(iii).

12. 15 C.F.R. § 379.11.

States.<sup>13</sup> The constitutionality of present controls was challenged in two wartime cases on the ground of an unconstitutional delegation of legislative power to the executive. In *United States v. Rosenberg*<sup>14</sup> the court of appeals distinguished earlier decisions holding unconstitutional broad delegations of power on the ground of "the traditional dominance of the Executive in the conduct of foreign affairs."<sup>15</sup> However, this ground was unnecessary to the decision, the court holding the statute did in fact set a sufficiently definite standard. A district court decision, *United States v. Bareno*,<sup>16</sup> appearing before the decision on appeal in the previous case, upheld constitutionality in terms of a reasonable basis for the broader delegation. "In the present war, there is scarcely a thing normally in common civilian use which is not needed for the prosecution of the War. This has never been true in previous wars."<sup>17</sup> The President's power to carry on foreign relations includes the power to regulate the exportation of all goods.

### Procedure

The privilege of engaging in export transactions from the United States may be denied to any person violating the act or regulations solely by administrative action.<sup>18</sup> As with other temporary legislation, the functions exercised under the act have been specifically excluded from the operation of the Administrative Procedure Act.<sup>19</sup> There is no requirement that administrative proceedings be brought within a particular time: proceedings may be reopened "at any time" for hearing new evidence.<sup>20</sup> The Bureau has reopened cases several months after the previous "final" determination.<sup>21</sup>

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13. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

14. 150 F.2d 788 (2d Cir. 1945), *cert. denied*, 326 U.S. 752 (1945).

15. 150 F.2d at 790.

16. 50 F. Supp. 520 (D. Md. 1943).

17. *Id.* at 525.

18. 15 C.F.R. § 382.1. It should also be noted that all licenses are subject to revision, suspension or revocation by the Bureau without notice. *Id.* § 370.2(c). In addition to the administrative procedure, any respondent may, by letter, be denied privileges in regard to validated licenses, 15 C.F.R. § 382.11(a), or while under investigation, may be denied all export privileges for up to thirty days without prior hearing or notice. *Id.* § 382.11(b); *London Export Corp.*, 21 Fed. Reg. 1941, 3765 (1956) (all administrative cases herein cited to Fed. Reg. were decided by the Bureau of Foreign Commerce). See *Zemanek & Co.*, 20 Fed. Reg. 7383 (1955), 21 Fed. Reg. 3610 (1956) (further violation while original denial order in effect).

19. Section 7, 63 Stat. 7 (1949), 50 U.S.C. APP. § 2027 (1953) (except as to the requirement of publication of regulations and orders in the *Federal Register*). See also S. REP. No. 31, 81st Cong., 1st Sess. 6 (1949).

20. 15 C.F.R. § 382.12; *Italian Nova Works*, 20 Fed. Reg. 775 (1955).

21. *Union Européenne de Produits Chimiques*, 21 Fed. Reg. 4322 (1956) (denial of privileges extended from one year to duration of controls).

Any person against whom proceedings are initiated is entitled to a hearing conducted by a compliance commissioner appointed by the Bureau. His findings are reviewed by the Director of Export Supply who determines the disposition of the case.<sup>22</sup> The respondent may appeal an order denying him privileges to the Appeals Board of the Department of Commerce,<sup>23</sup> upon the ground, "1) that the findings of violation are not supported by any substantial evidence, 2) that prejudicial error of law was committed, or 3) that the provisions of the order are arbitrary, capricious, or an abuse of discretion."<sup>24</sup> Appeals may also be made on broader grounds of exceptional hardship or improper discrimination.<sup>25</sup> Taking an appeal does not stay the effect of a denial order. The decision of the Appeals Board is to be final.<sup>26</sup>

Persons failing to answer written interrogatories may be denied export privileges "indefinitely."<sup>27</sup> Temporary denial orders are not usually issued.<sup>28</sup> However, where the respondent is later found to have violated the law, the suspension period often runs retroactively from the date of the first temporary denial order.<sup>29</sup>

### *Enforcement*

Sanctions available to the Bureau extend to the permanent denial of the privilege of exporting or receiving goods or otherwise participating in the exportation of any commodity from the United States to any foreign destination.<sup>30</sup> In practice discretion is used to prescribe lesser penalties by limiting the restriction to validated licenses only,<sup>31</sup> or to particular commodities,<sup>32</sup> or lessening the term of proscription,<sup>33</sup> and in some instances suspending the denial order pending good behavior.<sup>34</sup>

22. 15 C.F.R. § 382.

23. The Appeals Board is not part of the Bureau of Foreign Commerce. Its decisions are no longer printed in the Federal Register under that heading, but under "Department of Commerce." See 15 C.F.R. § 383.1(d).

24. *Id.* § 382.13.

25. *Id.* § 383.1(e). These grounds also apply to a refusal to grant a validated license.

26. *Id.* § 382.13(d).

27. 15 C.F.R. § 382.15. See *M. Newmark & Co.*, 21 Fed. Reg. 2851 (1956).

28. *American Levant Industrial Co.*, 22 Fed. Reg. 290 (1957). But see case of *Americauto*, where the original temporary denial order, 21 Fed. Reg. 7703 (1956), was successively extended, 21 Fed. Reg. 9749 (1956), 22 Fed. Reg. 643, 868, 1649 (1957). See note 18 *supra*.

29. *Adolf Duhme*, 21 Fed. Reg. 5944 (1956).

30. 15 C.F.R. § 382.1. The ban may extend to Canada even though exportations to Canada do not require general or validated export licenses. *Id.* § 370.2(a)(1).

31. *Charles Y. Rofo*, 18 Fed. Reg. 6365 (1953), privileges conditionally restored, 19 Fed. Reg. 6885 (1954).

32. *Standard Int'l Corp.*, 19 Fed. Reg. 4429 (1954).

33. See, e.g., *Joachim Wilhelm Wilhelm Krugel*, 18 Fed. Reg. 5521 (1953); *E. A. Bromund Co.*, 14 Fed. Reg. 1689 (1949).

34. *Willys-Overland Export Co.*, 20 Fed. Reg. 4191 (1955).

The suspension has sometimes been delayed so as not to penalize those with whom the respondent has existing obligations.<sup>35</sup> The respondent may be denied privileges for the "duration of export controls," but is permitted to apply for reinstatement after a period of time.<sup>36</sup> Denial of privileges for the "duration" is in effect permanent in the light of the repeated extension of controls, and it has been so described.<sup>37</sup> A list of all individuals and firms who are currently subject to denial orders is printed in the regulations.<sup>38</sup>

Criminal prosecution is also available as a remedy against those violating the act or regulations. Numerous persons and firms have been convicted and fined or sentenced to imprisonment.<sup>39</sup> Such convictions are usually for failing to give complete information in applications for export licenses, or for conspiracy to violate the export control laws.<sup>40</sup> Prosecutions must be brought within five years.<sup>41</sup>

A third remedy available to the Government is forfeiture proceedings. The regulations provide that goods "attempted to be, or being, or intended to be, or which have been" exported from the United States in violation of these laws are subject to seizure.<sup>42</sup> Comparatively few cases of forfeiture in this area are reported.<sup>43</sup> The Export Control

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35. Franz Hanke, 19 Fed. Reg. 2432 (1954).

36. Theodore E. Kedros, 22 Fed. Reg. 3424 (1957), *revoking* 15 Fed. Reg. 4879, 8866 (1950); Paul Wormser & Co., 19 Fed. Reg. 5064 (1954) (previous petition for revocation denied).

37. "The Klaasen Co. had been permanently denied all export privileges." Union Européenne de Produits Chimiques, 20 Fed. Reg. 9469 (1955), 21 Fed. Reg. 4322 (1956).

38. 15 C.F.R. § 382.51.

39. See, *Hearings Before the House Committee on Banking & Currency on H.R. 4882*, 83rd Cong., 1st Sess. 18-20 (1953).

40. See, e.g., *United States v. Leviton*, 193 F.2d 848 (2d Cir. 1951), *cert. denied*, 343 U.S. 946 (1952); *United States v. Rosenberg*, 150 F.2d 788 (2d Cir. 1945), *cert. denied*, 326 U.S. 752 (1945); *United States v. Kertess*, 139 F.2d 923 (2d Cir. 1944), *cert. denied*, 321 U.S. 795 (1944).

41. 18 U.S.C. § 3282 (Supp. V, 1958).

42. 15 C.F.R. § 381.1(b). Although goods "intended to be" exported may be seized, the courts have construed this narrowly since 1945 to mean illegal exportations presently imminent. *United States v. Moreno*, 182 F.2d 258 (5th Cir. 1950). Goods which have been exported once illegally are subject to seizure if they are returned to United States territory, even if only in transit. *Distribuidora Exclusiva, S.A.*, 15 Fed. Reg. 591 (1950). Recently goods were exported, apparently validly, but the export licenses were revoked, and the Bureau of Foreign Commerce ordered the carrier to return the goods to the United States. They were seized after being landed in New York, and forfeiture proceedings were brought. *United States v. Borax*, 11,020 Bags, 137 F. Supp. 216 (E.D.N.Y. 1956); *N.Y. Times*, Aug. 27, 1955, p. 30, col. 8.

The regulations also provide for seizure of the carrier involved in illegal exportations. Forfeiture may be had even though the owner is completely innocent of wrongdoing. *United States v. Morachis*, 154 F.2d 918 (9th Cir. 1946), and even though the value of the contraband is wholly out of proportion to that of the carrier, *United States v. One 1942 Chevrolet Truck*, 164 F.2d 461 (5th Cir. 1947).

43. In some years the number of forfeiture proceedings has been considerable. Two hundred thirty-three cases were brought in 1953, while only twenty-eight were brought in 1954. DOUGLAS, *WE THE JUDGES* 91 (1956).

Act itself makes no provision for forfeiture of goods; such actions are brought under the Espionage Act.<sup>44</sup> Proceedings of this nature are effective in preventing violations. Generally, people will not risk losing their property by confiscation unless there is something to make it very much worth their while. But the jurisdiction of the court can take hold only when the goods are actually present; after the goods have been exported, United States courts are powerless to order forfeiture unless by some fortuitous circumstance the goods return.

### *Extraterritorial Administrative Controls*

By means of administrative regulations United States authorities attempt to control movement of goods outside the United States. Goods shipped under general license may be transshipped to another destination only if the goods could have been shipped there directly from the United States under such general license.<sup>45</sup> Another provision makes it unlawful knowingly to "export, dispose of, divert, transship or reexport" goods in violation of any export control document or prior representation.<sup>46</sup> While this section applies to persons in the United States, it also by its very terms applies to persons and goods outside the United States.

Another set of regulations, known as Transaction Controls, makes it unlawful for any person situated in the United States to ship Positive List commodities from one foreign country to another if they could not have been so shipped directly from the United States.<sup>47</sup> Goods moving through the United States to the Soviet bloc are treated as goods originating in the United States.<sup>48</sup>

American flag vessels and aircraft are prohibited from carrying to Hong Kong or Macao any strategic or war materiel unless a validated license has been issued, and are absolutely prohibited from calling at ports controlled by Communist China.<sup>49</sup> The order includes shipments not originating in the United States and purports to relieve such carriers from liability for breach of contract for nondelivery, even where held liable by court order.<sup>50</sup> However, a foreign court holding

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44. 40 Stat. 223 (1917), as amended, 22 U.S.C. § 401 (Supp. V, 1958); *United States v. Twenty-one Lbs. 8 Oz. of Platinum*, 147 F.2d 78 (4th Cir. 1945).

45. 15 C.F.R. § 371.4 (Supp. 1958) (general license); *id.* § 372.12 (validated license).

46. 15 C.F.R. § 381.6.

47. 31 C.F.R. § 505 (Supp. 1958). This regulation went into effect in 1953.

48. 15 C.F.R. § 371.9(a) (1) (iii) (Supp. 1958).

49. 32A C.F.R. 209, regs. T-1, T-2 (1958).

50. See Defense Production Act of 1950, 64 Stat. 818, 50 U.S.C. App. § 2157 (1952).

a carrier liable for nondelivery under this order ordinarily would not find itself bound by this last provision.<sup>51</sup>

## II. ADMINISTRATIVE SANCTIONS: DENIAL OF THE EXPORT PRIVILEGE

The most important, and presently most effective, remedy available to the United States Government in cases of violations of American export controls by persons outside the jurisdiction of the United States is the denial of the right to engage in export transactions originating in the United States.<sup>52</sup> The regulations permit administrative action against "any person,"<sup>53</sup> it being unlawful for "any person, whether or not situated in the United States" to make misrepresentations to, or conceal material facts from, the Bureau.<sup>54</sup> Thus, by their terms such provisions can apply to acts occurring outside the United States, especially in cases of transshipment or re-exportation of goods.<sup>55</sup>

Denial orders are generally couched in broad terms, purporting to exclude the named respondents, as well as any individuals or firms associated with or controlled by them, from participating in any manner in any export transaction from the United States. This includes buying or selling goods which have been exported from the United States, and dealing with other foreign firms in relation to goods of United States origin.

This remedy is by no means confined to persons attempting to ship goods illegally to the Soviet bloc. A series of cases dealt with American and Mexican firms which engaged in exporting to Mexico a particular type of used rail. The National Production Authority had determined in the interest of national defense that such rails could be exported if they were to be laid as track, but not in order to be rerolled. In applying for export licenses respondents misrepresented that the rails were to be relaid, whereas in fact they were rerolled. In all cases the Mexican as well as the American firms were denied export privileges.<sup>56</sup>

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51. Exportation of certain other categories of goods is regulated by other agencies of the Government. The most important of these is the control of shipments of implements of war by the National Munitions Control Board, Department of State. 68 Stat. 848, 22 U.S.C. § 1934 (Supp. V, 1958). For other categories, see 15 C.F.R. § 370.4.

52. The procedure is identical with that for domestic violations. See text accompanying note 18 *supra*.

53. 15 C.F.R. § 382.1.

54. 15 C.F.R. § 381.5(b).

55. 15 C.F.R. § 381.6; see also *id.* § 381.4.

56. Laminadora Atzacotzalco, S.A., 19 Fed. Reg. 6954 (1954); Commercial Metals Co., 19 Fed. Reg. 4095 (1954); Arturo Flores, 19 Fed. Reg. 4112 (1954) (all same transaction); Richard Nathan Corp., 21 Fed. Reg. 595 (1956); Cia. Comercial Colon, S.A., 22 Fed. Reg. 725 (1957) (same transaction); California Trading Co., 19 Fed. Reg. 6533 (1954).



In another case an American exporter shipping goods under general license to Cuba fraudulently entered low values on the documents in order to help the Cuban importer escape certain import duties. The compliance commissioner, in recommending a suspended denial for both respondents, said, "[T]he objective sought by them, though not to be condoned, had become a frequent practice among exporters to Cuba, a practice which should be stopped and to which end public notice in the form of this order is desirable."<sup>57</sup>

Ignorance of American law is generally not a defense to the foreign respondent.<sup>58</sup> He will also be held accountable if he knows or should know that those with whom he does business have previously been denied privileges by the Bureau.<sup>59</sup> However, it must be shown that the violator did have actual knowledge of illegality in dealing with cases of misrepresentation, unlawful diversion of goods, or transacting business with persons under suspension.<sup>60</sup>

Foreign firms have been subject to action for legally exporting goods of United States origin from their own country, yet violating United States law. The problem arises when the United States export license gives Israel, for instance, as ultimate destination yet Israel permits export to Bulgaria and issues a license although the buyer could not have exported the goods directly from the United States to Bulgaria.<sup>61</sup>

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57. Ace Export Co., 19 Fed. Reg. 7302 (1954). This use of the export control regulations to prevent violations of foreign law is questionable as a matter of policy. Canadian firms found to have violated United States regulations are prohibited from using Canadian export outlets for export of strategic goods. N.Y. Times, Dec. 29, 1951, p. 17, col. 6.

58. Guy N. F. Nord, Ltd., 17 Fed. Reg. 1633 (1952); see also Stemmler-Imex, N.V., 21 Fed. Reg. 1942 (1956), *affirming* 20 Fed. Reg. 8202 (1955). See *Hearings Before the Subcommittee on Investigations on East-West Trade, Senate Committee on Government Operations*, 84th Cong., 2d Sess. 350, 352 (1956).

59. 15 C.F.R. § 381.10; Johannes M. A. Klaasen, 18 Fed. Reg. 7179 (1953). The forwarding agent was "a notorious known transshiper of strategic American goods to Soviet areas" and had been deprived of American privileges. "[S]uch deprivation was a matter of general knowledge in Holland; but . . . such knowledge failed to deter Klaasen . . . from continuing to employ [his] services. . . ." This successively caught a French Company which later sold American goods to Klaasen, for which it was denied export privileges. Union Européenne de Produits Chimiques, 20 Fed. Reg. 9469 (1955). See also Gyma Labs. of America, Inc., 21 Fed. Reg. 6305 (1956), where respondent was denied privileges for permitting a firm under suspension to arrange a transaction with another firm without inquiring into the relation between the two.

60. 15 C.F.R. § 381. See Francesco Parisi, 17 Fed. Reg. 483 (1952), *revoking* Smoliner & Kratky, 16 Fed. Reg. 12794 (1951).

61. Sudexport and General Import Export Co., 22 Fed. Reg. 4512 (1957); Richard Fleschner Import-Export, 22 Fed. Reg. 2717 (1957); Codechimie S.P.R.L., 22 Fed. Reg. 2741 (1957). And see Nisan Simon Cohen, 22 Fed. Reg. 3134 (1957), where respondent was denied export privileges for legally shipping aureomycin to China from the Netherlands, when he knew such commodity could originate only in the United States and that it could not be purchased in the United States if destined for China. Respondent was not involved in the export transaction, having purchased the aureomycin from a vendor in the Netherlands who in turn had purchased it from the Belgian importer.

The Bureau is generally more lenient with foreign firms which cooperate with American investigators overseas. Recently a compliance commissioner praised respondents in one case for not defending by dilatory tactics or false denials, but nevertheless denied them all export privileges for one year.<sup>62</sup> That this was lenient may be seen by comparing it with another order where it was noted the Japanese respondents had willfully refused to cooperate and that Bureau agents had been unable to discover what had happened to the goods. Even though the charges were not proved, the compliance commissioner permanently denied all export privileges, giving as his reason that respondents had shown that any attempt to police exports to them would be frustrated.<sup>63</sup> In another case the Dutch forwarder's general manager put off inquiries by the United States consulate concerning whereabouts of a dismantled mill then in Rotterdam harbor until after the mill was en route to Hungary. The denial order permitted the forwarder to apply for a modification if it dismissed its general manager.<sup>64</sup>

Persons engaged in export transactions are required to report to the Bureau any information they have by which they suspect an unlawful diversion may occur. How small a suspicion must be reported is unclear.<sup>65</sup> This duty to make known such facts is imposed upon foreign respondents also.<sup>66</sup>

Other factors have been given as reasons for not imposing strict penalties on respondents. The financial impact on respondent<sup>67</sup> or on third parties,<sup>68</sup> if other circumstances justify it, may reduce the harsh effect of a long period of suspension. That the goods involved were not of a strategic nature, or were not destined for the Soviet bloc, may work in respondent's favor.<sup>69</sup> The respondent's "good behavior"

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62. Continental Import & Export Co., 20 Fed. Reg. 8224 (1955), *appeal denied*, 21 Fed. Reg. 2208 (1956); see also Union Européenne de Produits Chimiques, 20 Fed. Reg. 9469 (1955).

63. Levee & Co., 21 Fed. Reg. 775 (1956); see also Electrical Agencies (London), Ltd., 18 Fed. Reg. 2659 (1953). Parties are required to disclose information as to past uses of export licenses. If, without justification, they do not, they are not entitled to participate in future export transactions. London Export Corp., 21 Fed. Reg. 1941 (1956); M. Newmark & Co., 21 Fed. Reg. 2851 (1956) (refusal to answer written interrogatories).

64. Satis, A. G., 16 Fed. Reg. 10088 (1951). Privileges were restored three and one-half years later, the dismissal requirement having been vacated. N. V. Nederlands Transport Bureau, 20 Fed. Reg. 4596 (1955).

65. See Willys-Overland Export Corp., 20 Fed. Reg. 4191 (1955).

66. Joachim Wilhelm Krugel, 18 Fed. Reg. 5521 (1953).

67. D. Lijnzaad, N.V., 20 Fed. Reg. 8226 (1955), *appeal denied*, 21 Fed. Reg. 2853 (1956).

68. See United Petrolifera Italiana S.R.L., 21 Fed. Reg. 5197 (1956).

69. Confidential Overseas Forwarding, Inc., 21 Fed. Reg. 3295, *modified*, 21 Fed. Reg. 3703, 5240 (1956).

during the investigation or thereafter may result in a lessening of the penalties. This was given as the reason for rescinding a denial order after four years in force.<sup>70</sup> Other mitigating factors were the duration of the temporary denial order,<sup>71</sup> or other penalties already imposed on respondent.<sup>72</sup> Also considered in mitigation have been the fact that international relations were not as tense at the time of the diversion,<sup>73</sup> and the "necessity of rebuilding Japan after hostilities."<sup>74</sup>

While there have been instances of the charges against foreign respondents being dismissed,<sup>75</sup> where the charges are found true other defenses are generally passed over. The intermediary's fear that his American seller would take over his future business with his Czech customer was rejected as "frivolous."<sup>76</sup> The legality of the foreign company's actions where it is situated and where the actions took place is not a defense to contraventions of United States law.<sup>77</sup> As to misrepresentations it is not difficult to find that the misrepresentation took place in the United States when received by the Bureau of Foreign Commerce, and therefore there is jurisdiction as over any events occurring within the national territory. A more serious matter is the claim that United States law continues to govern after the goods have reached their stated destination.<sup>78</sup> While this claim would doubtless be recognized in United States courts,<sup>79</sup> it is doubtful if a similar result would be reached in foreign courts.

In addition the Bureau asserts its authority to investigate in foreign countries on the basis of the statute,<sup>80</sup> yet the statutory authority is not in the explicit language usually required by courts in order to be interpreted as extending into foreign jurisdictions. In fact the section could well be interpreted as referring only to the confines of the United States, as it gives power to United States courts to enforce subpoenas, which power is necessarily restricted to territorial

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70. Paul Wormser & Co., 19 Fed. Reg. 5064 (1954), *rescinding* 15 Fed. Reg. 3194 (1950).

71. Richard Fleschner Import-Export, 22 Fed. Reg. 2717 (1957).

72. K. Burgi-Tobler & Co., 22 Fed. Reg. 1343 (1957) (seizure of goods); Jerome E. Robinson, 22 Fed. Reg. 2217 (1957) (prison term and loss of job).

73. Joachim Wilhelm Krugel, 18 Fed. Reg. 5521 (1953).

74. Shotaro Higasa, 18 Fed. Reg. 6722 (1953).

75. I. K. Lai, 21 Fed. Reg. 777 (1956); Arbuckle, Smith & Co., 20 Fed. Reg. 7554 (1955).

76. S. A. Comptoir N. V. Paul Stevens & Co., 16 Fed. Reg. 9667 (1951).

77. Continental Import & Export Co., 20 Fed. Reg. 8224 (1955).

78. Sudexport & General Import Export Co., 22 Fed. Reg. 4512 (1957); see text accompanying note 61 *supra*.

79. *Cf.* United States v. Aluminum Co. of America, 148 F.2d 416, 443-44 (2d Cir. 1945).

80. 63 Stat. 8 (1949), 50 U.S.C. App. § 2026(a) (1952); London Export Corp., 21 Fed. Reg. 1941 (1956), *order issued*, 21 Fed. Reg. 3765 (1956).

jurisdiction. Such an interpretation would seriously hamper enforcement of the law.

Denial of privileges may occur whether or not action has been taken against respondent locally. The Bureau's order sometimes notes such occurrences, and indicates that respondent has been arrested or his goods seized by the local authorities.<sup>81</sup> In one case it was noted the United States occupation authorities in Austria had detained the goods.<sup>82</sup>

It is clear, however, that American authorities may not be so fortuitously placed in the future as to be able to intercept goods destined for illegal destinations. It is also clear that, had controls presently in effect in certain foreign countries been in effect previously, violation of American controls would have been more difficult. One Krugel, an English broker, shipped Positive List goods from the United States to Switzerland by giving false statements to export control authorities in the United States, and then diverting the goods at Antwerp from Switzerland to the Soviet Union.<sup>83</sup> Transaction controls now in effect in England<sup>84</sup> would have made such a transaction illegal in England.<sup>85</sup> But at the time denial of American export privileges was the only remedy.

One factor which must be remembered at all times is the overriding discretion of the Bureau in granting licenses, subject only to the broad policies set forth in the act.<sup>86</sup> Even if insufficient evidence is disclosed as to violations by a particular person to justify a denial order, the Bureau will carefully scrutinize any license application for a transaction involving such person. The same is true in regard to those persons against whom denial orders have expired and those engaged in Iron Curtain transactions not originating in the United States.<sup>87</sup>

Administrative action by the United States against foreign persons who have violated its export control regulations is effective only prospectively. The possibility of being denied such privileges may be a sufficient deterrent to many importers and others overseas who do a large business in the United States. Such a denial also punishes the particular violator by making him go elsewhere than the United States

81. See, e.g., *Well Lu Trading Co.*, 19 Fed. Reg. 3009 (1954); *Maurice May, Inc.*, 17 Fed. Reg. 964 (1952).

82. *Gambaro Corp. Constr. Co.*, 16 Fed. Reg. 3670 (1951).

83. *Joachim Wilhelm Krugel*, 18 Fed. Reg. 5521 (1953).

84. *Strategic Goods (Control) Order*, [1954] 2 STAT. INSTR. 2174 (No. 1622), as amended, [1955] 2 STAT. INSTR. 2546 (No. 1280).

85. See *MUTUAL DEFENSE ASSISTANCE CONTROL ACT*, FIFTH REPORT 27 (1954) (hereinafter cited as 5 MDAC).

86. 63 Stat. 7 (1949), 50 U.S.C. APP. § 2022 (1952); 15 C.F.R. § 373.1.

87. See *Hearings Before the House Committee on Banking & Currency on H.R. 4882*, 83d Cong., 1st Sess. 9-10 (1953). About 15% of requests for licenses are not favorably acted upon. *Hearings on H.R. 4882*, *supra* at 25.

for his business. But such action does not bring back the goods, nor, in a majority of the situations, does it stop them.

### III. EFFORTS TO SECURE COOPERATION OF FOREIGN NATIONS

If the Export Control Act were made to depend for its enforcement solely upon the administrative power of the Bureau of Foreign Commerce to deny export privileges, the export control policy of the United States might be in large measure frustrated. In order to prevent goods from reaching their illegal destinations after they have left the United States it is necessary to elicit the cooperation of the nation into whose jurisdiction the goods have passed. Toward this end Congress has passed certain coercive legislation designed to induce sister nations to support our embargo policies. Another focus of United States policy to be discussed in this section, less publicized, but more effective in obtaining unity of methods and aims, is the western informal committee on East-West trade known as the Consultative Group.

Under the Battle Act<sup>88</sup> the President is authorized to enlist the aid of all nations in enforcing the policy of the United States as declared by Congress.<sup>89</sup> Section 101 declares that policy to be the placing of an embargo on the shipment of arms and other items of primary strategic significance to any "nation . . . threatening the security of the United States, including the Union of Soviet Socialist Republics. . . ." Under the act two embargo lists were drawn up and went into effect on January 24, 1952. The Title I, Category A list is composed of "arms, ammunition, implements of war, and atomic energy materials"; all military, economic, or financial assistance must be cut off to any nation which knowingly permits shipment of any of the items on this list to the Soviet bloc. The Title I, Category B list contains other strategic materials named in section 103(a);<sup>90</sup> assistance must be cut off to any nation as before, but the President has discretion not to cut off aid if it "would clearly be detrimental to the security of the United States."<sup>91</sup> The President has used his discretion not to discontinue aid on several occasions.<sup>92</sup>

88. Mutual Defense Assistance Control Act of 1951, 65 Stat. 644, 22 U.S.C. §§ 1611-13c (1952).

89. 65 Stat. 646, 647 (1951), 22 U.S.C. §§ 1612(a), 1613 (1952).

90. 1 MDAC 37, 43 (1952).

91. Mutual Defense Assistance Control Act of 1951, 65 Stat. 646, 22 U.S.C. § 1611b (1952). One interesting application of Battle Act sanctions occurred with Ceylon. That country agreed to trade China rubber for rice. Although done at considerable advantage to Ceylon, United States aid to Ceylon was halted. *Hearings Before the House Committee on Foreign Affairs on East-West Trade*, 83d Cong., 2d Sess. 17 (1954) (hereinafter cited as *Hearings on East-West Trade*). On Ceylon's admittance to the United Nations, aid was resumed. *London Times*, Feb. 13, 1956, p. 6, col. 3; see *N.Y. Times*, Dec. 20, 1955, p. 13, col. 2.

92. 1 MDAC 45 (1952); 2 MDAC 77 (1953); 5 MDAC 65 (1954).

A Joint Operating Committee (JOC) has been organized to coordinate policies under the Export Control Act and Battle Act.<sup>93</sup> The International Cooperation Administration administers the Battle Act lists of items which the United States believes should be controlled by other countries. This is generally less inclusive than the Positive List of goods drawn up by the Bureau of Foreign Commerce, controlling exports from the United States.

At the top of the structure of the Western World's controls on trade with the Soviet bloc is the Consultative Group (CG). Fifteen nations are represented there on the ministerial level.<sup>94</sup> The Consultative Group meets at intervals to discuss the economic defense policy of the members in order better to coordinate their strategic trade controls.<sup>95</sup> CG has two day-to-day working groups, the Coordinating Committee (COCOM), which is concerned with trade with Eastern Europe, and the China Committee (CHINCOM), concerned with the more drastic restrictions on trade with Communist China.<sup>96</sup>

CG is responsible for drawing up the international lists<sup>97</sup> of which there are four: 1) items totally embargoed, 2) items for which a quota has been found appropriate, 3) items to be carefully watched, and 4) the China list containing additional items completely embargoed in regard to China and North Korea in accordance with the United Nations resolution of May 18, 1951.<sup>98</sup> These lists constitute a minimum level which all countries accept. The national control lists of many members, including the United States' Positive List, contain many more items than the agreed minimum.<sup>99</sup>

In previous years disagreement has been evidenced over relaxation of controls on nonstrategic goods.<sup>100</sup> Revisions have occurred periodi-

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93. JOC is composed of representatives of the agencies sitting on the Advisory Committee on Export Policy (ACEP), which advises the Secretary of Commerce, and the Economic Defense Advisory Committee (EDAC), which advises the Secretary of State and Director of ICA on free world strategic controls. *Hearings on East-West Trade* 5.

94. Belgium, Canada, Denmark, France, Greece, Italy, Japan, Luxembourg, Netherlands, Portugal, Turkey, United Kingdom, United States, West Germany.

95. *Hearings on East-West Trade* 7.

96. 5 MDAC at vii (1955).

97. *Hearings on East-West Trade* 24. For a description of the interrelation of the international and Battle Act lists, see 33 DEP'T STATE BULL. 921 (1955).

98. This list has been abolished by most of the members other than the United States. N.Y. Times, July 17, 1957, p. 3, col. 4.

99. *Hearings Before the Subcommittee on Investigations on East-West Trade, Senate Committee on Government Operations*, 84th Cong., 2d Sess. 350 (1956).

100. Controls on trade with Communist China have been a source of disagreement. Many members of the United Nations, not members of the Consultative Group, voluntarily joined in this embargo. *Hearings on East-West Trade* 2. But in 1957 the British government finally gave in to considerable pressure at home and in the Commonwealth and unilaterally relaxed these controls. Export of Goods (Control) (Consolidation) Order, 1956 (amend. 4), STAT. INSTR., 1957, No. 950; see N.Y. Times,

cally; the purpose is not mere reduction, but a more meaningful and selective coverage.<sup>101</sup>

One result of international cooperation has been the import certificate-delivery verification (IC/DV) procedure.<sup>102</sup> By this device the exporting nation, by virtue of its jurisdiction over the exporter, requires him to demand from the importer with whom he deals a commitment by the importer to the importer's country that the goods once imported will be used in that country. Thus, the exportation cannot take place until the importer has subjected himself to the effective criminal sanctions of his own country. In this way the exporting nation has the duty of discovering whether its embargo legislation has been violated, but it also has the necessary information to determine whether a violation has taken place.

While most COCOM nations have adopted IC/DV procedure with the United States, its use is not as widespread as American officials would like.<sup>103</sup> It cannot prevent transshipment; it merely makes discovery of transshipment easier and puts a greater burden on the importer by making him subject to penalties by his own government for unauthorized diversion or transshipment. The difficulty is that only those countries cooperating with the United States as a matter of policy have agreed to this system; exporters shipping goods to other countries must do with the less reliable consignee/purchaser statement from the importer. Nor is the procedure applicable to overseas terri-

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May 31, 1957, p. 1, col. 8. As to possible Battle Act sanctions, see S. REP. No. 2621, 84th Cong., 2d Sess. 46-47 (1956). The new controls are identical with those on exports to other countries in the Soviet bloc. A suggested revision by the United States within COCOM was rejected. The gap in policies has been widened with similar decontrol action by France, West Germany, Belgium, Netherlands, and Japan. N.Y. Times, May 6, 1957, p. 1, col. 7; June 19, 1957, p. 3, col. 6; July 17, 1957, p. 3, col. 4. Decontrol was accomplished despite the rigid opposition of the United States, which still maintains the "total economic embargo" against Communist China and North Korea in effect since December 1950. *Hearings on East-West Trade 2*. A loophole in this policy exists where American corporations share in profits of sale to Communist China by their Japanese affiliates and licensees. Wall St. J., Aug. 30, 1957, p. 1, col. 1.

101. SECRETARY OF COMMERCE, 34TH REPORT ON EXPORT CONTROL 15 (1956). The last revision occurred on August 15, 1958. N.Y. Times, July 31, 1958, p. 7, col. 1; Aug. 15, 1958, p. 2, col. 6; Sept. 4, 1958, p. 44, col. 1.

102. See 15 C.F.R. § 373.2, Explanatory Statement 1 (1956). The Bureau requires submission of an import certificate by the exporter, showing the importer's commitment to his government that the goods will be used in that country; upon delivery, a delivery verification certificate must be submitted. Both documents are issued by the government of the importer. For IC/DV procedure in regard to imports to the United States from COCOM countries, see 15 C.F.R. § 368 (1956). If the shipment is to be made to a nation which does not issue import certificates, a consignee/purchaser statement from the purchaser and ultimate consignee is required. *Id.* § 373.65, as amended, 22 Fed. Reg. 784 (1957).

103. *Hearings on East-West Trade 27*. Among the nations issuing import certificates are all COCOM members, Switzerland, Belgian Congo and Hong Kong.

104. See 15 C.F.R. § 373.2, Explanatory Statement 10 (1956).

tories of COCOM members.<sup>104</sup> Despite its limitations it is generally agreed that use of this procedure would make impossible today some of the cases of flagrant violation of controls in the past.<sup>105</sup>

### *Export Control in Great Britain*

The United States Government may request the foreign government in question to prevent a diversion of the goods.<sup>106</sup> As an example, we shall examine briefly British export controls.

At the present time control over exportation of goods is strictly regulated in Great Britain. Authority for the present scheme was enacted in 1939,<sup>107</sup> although some controls existed during the first world war. The legislation of 1939 permits the Board of Trade to prohibit or regulate exportation of goods from the United Kingdom as "the Board think expedient."<sup>108</sup> Goods exported in violation of law or "brought to any quay or other place, or waterborne, for the purpose of being exported" in violation of law are deemed to be prohibited goods and shall be forfeit, and the exporter is liable to a penalty of £500.<sup>109</sup> An exporter must, if requested, satisfy the Commissioners of Custom that the goods have reached their destination; the Commissioners have power to detain shipments when they suspect a false statement as to their ultimate destination.<sup>110</sup>

The list of goods for which licenses are required is published under authority of the act, and brought up to date periodically. It contains regulations in regard to applying for licenses, as well as schedules of restricted commodities.<sup>111</sup> The First Schedule contains a list of all commodities for which an export license is required. Certain items (marked therein with the letter "A") require no license for export to the British Commonwealth, United States, and Ireland.<sup>112</sup> All other items require no license; it is the responsibility of the exporter to show that the item does not appear on the First Schedule.

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105. See, e.g., Joachim Wilhelm Krugel, 18 Fed. Reg. 5521 (1953); Board of Trade v. Owen, [1957] 1 All E.R. 411 (H.L.).

106. See United Petrolifera Italiana S.R.L., 21 Fed. Reg. 5197 (1956).

107. Import, Export & Customs Powers (Defence) Act, 1939, 2 & 3 Geo. 6, ch. 69.

108. 2 & 3 Geo. 6, ch. 69, § 1(1).

109. 2 & 3 Geo. 6, ch. 69, § 3(1). The comparable American regulation may be found at 15 C.F.R. § 381.1(b), making subject to forfeiture any goods "attempted to be, or being, or intended to be, or which have been" exported in violation of law.

110. 2 & 3 Geo. 6, ch. 69, § 7. See 15 C.F.R. § 381, and text accompanying note 54 *supra*.

111. Exports of Goods (Control) (Consolidation) Order, [1956] 1 STAT. INSTR. 578 (No. 1702), as amended, *id.* at 611 (No. 1960), [1957] 1 STAT. INSTR. 594 (No. 247), 600 (No. 950), 601 (No. 1281), 604 (No. 2169). The former Second Schedule, listing additional items for which a license was required for export to China, Macao, North Vietnam, Tibet, and North Korea, was revoked by STAT. INSTR., 1957, No. 950.

112. Export of Goods (Control) (Consolidation) Order § 5(a), [1956] 1 STAT. INSTR. 578 (No. 1702).



A major difference between the American and British licensing systems is that the latter has no provisions concerning denial of exporting privileges. There is no published blacklist of names; control is maintained entirely in the discretionary granting or refusing to grant applications for licenses by the Board of Trade. As in the United States, all information given by exporters is confidential.<sup>113</sup> One result of this is that United States authorities are able to penalize violators of the law in respect to exporting of any goods, whereas it appears the British authorities exercise their control only over strategic goods. Nevertheless, any licenses or other authority given may be modified or revoked at any time.<sup>114</sup>

Transaction controls were recently put into effect in Great Britain prohibiting the disposal of goods situated outside the United Kingdom by persons within the United Kingdom to any person in the Soviet bloc.<sup>115</sup>

A number of prosecutions have taken place in England, but this method of deterring violations received a serious setback recently in the decision of the House of Lords in *Board of Trade v. Owen*.<sup>116</sup> The Lords held no indictment could be drawn for a conspiracy to violate foreign law if no unlawful acts took place in England. The defendants had acquired lead, copper and steel in West Germany by means of Irish end-use statements, the actual destination of the goods being Eastern Europe. There was no connection with England here except that the defendants were subject to British jurisdiction.

### *Suits by the Sovereign in Foreign Courts To Restrain Re-Export*

If the British government were not disposed to enact export controls, the possibility that the United States Government could obtain an injunction in a British court to enforce its own controls must be discounted. The decision of *King of Italy v. de Medici Tornaquinci*<sup>117</sup> exemplifies the situation here. Members of the Medici family had removed ancient family documents from Italy with the intention of selling

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113. Export Control Act of 1949, § 6(c), 63 Stat. 7, 50 U.S.C. APP. § 2026(c) (1952); 535 H.C. DEB. (5th ser.) 32 (1954).

114. Export of Goods (Control) (Consolidation) Order, 1956, § 10, [1956] 1 STAT. INSTR. 582.

115. Strategic Goods (Control) Order, 1954, [1954] 2 STAT. INSTR. 2174 (No. 1622), as amended, [1955] 2 STAT. INSTR. 2546 (No. 1280), [1956] 2 STAT. INSTR. 2329 (No. 577), STAT. INSTR., 1957, Nos. 245, 1282, 2170. Such controls are not new in England, but were in effect in regard to some commodities during World War I. See *In re Anglo-Russian Merchant Traders, Ltd.*, [1917] 2 K.B. 679 (C.A.).

116. [1957] A11 E.R. 411 (H.L.); see 71 HARV. L. REV. 371 (1957).

117. 34 T.L.R. 623 (Ch. 1918).

them in London. The court assumed the removal from Italy to be a violation of Italian law making such exportations illegal. He then distinguished between State papers and other documents having merely historical interest, granting an injunction against sale of the former only on the ground that it was not clear whether they were the property of the family or the State. An injunction was not granted as to the latter group, the court refusing to order these papers returned to Italy as they clearly belonged to the family.

In the hypothetical situation here, a court would not need to order the goods returned to the United States, since to leave them where they were would be to carry out the terms of the license granted. However, as the United States' interest is not one of property, but only of policy, the court would have no jurisdiction.<sup>118</sup>

#### IV. DEFENSES TO CIVIL SUITS IN FOREIGN COURTS

Violation of American export controls may subject the offender to denial of trading privileges, criminal prosecution, and confiscation of goods, either under American law or the parallel controls of sister nations. However, the exporter or carrier who acts in compliance with United States law may by so doing breach the contract of export and thus become liable to civil suit in a court of a foreign nation not having parallel controls. To what extent would the mandate of United States law provide a defense?

##### *Illegal Contract*

In the ordinary situation where an American exporter has arranged to sell an importer goods, he must comply with United States law in order to effect exportation. A contract originally made with the intention of frustrating American controls might be carried out as follows. The exporter wishes to ship goods to country X, but the Bureau of Foreign Commerce will not grant a license for export of such goods to that country. A license will be granted for export to the United Kingdom, however, and such goods may be exported from there to country X without a license.

It is clear by British law that a contract made in violation of foreign law, the performance of which will necessarily mean doing an illegal act in the national territory of that State, will not be enforced in an English court. This result was affirmed recently in *Regazzoni v. K. C. Sethia, Ltd.*<sup>119</sup> In 1946, the Indian government prohibited the

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118. See DICEY, *CONFLICT OF LAWS* 152 (6th ed. 1949).

119. [1956] 2 Q.B. 490 (C.A. 1955).

direct or indirect shipment of goods to South Africa as a political protest against treatment of Indians in that country. The parties engaged to ship jute bags from India to Europe where the plaintiff was to make the sale to a South African buyer. The defendants changed their minds and refused to deliver the goods. The court refused to enforce the contract, putting great emphasis on the fact that both parties knew and intended a violation of the Indian embargo and that performance of the contract could not be carried out without such a violation.

The court's decision is based on two rules, one that foreign law will be applied unless contrary to some English public policy, and the other that foreign legislation should be construed restrictively, and "as operating only within the territory of the sovereign."<sup>120</sup> That the law is intended to operate extraterritorially is of no consequence,<sup>121</sup> unless a statute of the law of the forum expressly recognizes such an effect.<sup>122</sup> The court rejected contentions that the Indian law was either a penal or revenue law, confiscatory, or political. Even if the Indian legislation were construed as operating only within Indian territory, it was here the intention of the parties to violate the Indian law within India by attempting to take the jute out of Indian territory unlawfully.

In following *Foster v. Driscoll*,<sup>123</sup> a case involving a scheme to take whisky from England into the United States in violation of United States law, the court said,

"There the venture was to get a prohibited commodity into the United States by finding someone . . . to take or smuggle it into the country and so earn high profits. Here the venture was dependent on someone getting out of the country the prohibited commodity which would fulfill this contract and enable the plaintiff in his turn to steal a march on lawful traders and make his profit out of the urgent demand of South Africa for jute bags."<sup>124</sup>

If there is any way the contract could be carried out without a violation of law, it will be presumed the parties intended to do it that way.<sup>125</sup> If the parties have not contracted for goods of American

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120. DICEY, *CONFLICT OF LAWS* 155 (6th ed. 1949).

121. See *Frankfurter v. W. L. Exner, Ltd.*, [1947] Ch. 629.

122. *United States v. Pink*, 315 U.S. 203, 218-21 (1942) (executive agreement); *Perutz v. Bohemian Bank*, 304 N.Y. 533, 110 N.E.2d 6 (1953) (membership in International Monetary Fund); *accord, Re Amand*, [1941] 2 K.B. 239, 254-55, [1942] 1 K.B. 445, *appeal denied*, [1942] 2 K.B. 26 (C.A.), *aff'd*, [1943] A.C. 147; see DICEY, *CONFLICT OF LAWS* 1953 (6th ed. 1949). *But see* 7 HALSBURY, *LAW OF ENGLAND* 283 (3d ed. 1954).

123. [1929] 1 K.B. 470 (C.A.).

124. [1956] 2 Q.B. at 503.

125. [1929] 1 K.B. at 496 (Scrutton, L.J., dissenting). See *Holman v. Johnson*, 1 Cowp. 341, 98 Eng. Rep. 1120 (K.B. 1775); *cf.* *British Nylon Spinners, Ltd. v. Imperial Chem. Indus., Ltd.*, [1955] Ch. 37 (1954).

origin, but merely for such goods of any origin, the seller can perform without violating American export controls, and illegality will not prevent enforcement of the contract.<sup>126</sup> The result would not differ even though the applicable law of the contract were different from the law making it illegal. In both *Foster v. Driscoll* and *Regazzoni v. K.C. Sethia* the proper law of the contract was English law, yet the respective contracts were found to be violative of American and Indian statutes and were not enforced. If the parties to the transaction have stipulated American law, an English court would be able to hold the contract unenforceable with greater ease as unenforceable by its proper law.<sup>127</sup>

### *Liability of Carriers for Refusal To Land Goods*

Serious conflict may arise in a situation in which the American Government orders an American flag vessel not to deliver goods to the consignee.<sup>128</sup> In 1950, a South African shipped jute bags from India to Venezuela, via New York. As they were transshipped in the United States, an intransit license was required, jute bags being on the Positive List. After leaving New York, they were diverted to South Africa, but the United States Government ordered the ship, nationality not disclosed, not to deliver to the consignee. The shipper then brought suit in South Africa for delivery and was opposed by the carrier and representatives of the United States Government, but he later withdrew the suit and was permitted to land the bags.<sup>129</sup> Although the fact is not disclosed, if the ship were a United States flag vessel, the restraint of princes clause<sup>130</sup> in the bill of lading would probably absolve the vessel from liability. The consignee and shipper were one and the same, so no loss could occur, assuming the shipper would have the goods or equivalent value returned to him.

In *American President Lines, Ltd. v. China Mut. Trading Co.*<sup>131</sup> an American carrier was held liable for damages for nondelivery of

126. See *Cooper & Sons v. Neilson & Maxwell, Ltd.*, [1919] Vict. L.R. 66; *P. N. Gray & Co. v. Cavalliotis*, 276 Fed. 565 (E.D.N.Y. 1921), *aff'd mem.*, 293 Fed. 1018 (2d Cir. 1923).

127. *Heriz v. Riera*, 11 Sim. 318, 59 Eng. Rep. 896 (Ch. 1840); *cf. De Wutz v. Hendricks*, 2 Bing. 314, 130 Eng. Rep. 326 (C.P. 1824) (transaction "contrary to the law of nations"). See also 7 HALSBURY, LAWS OF ENGLAND 386 (3d ed. 1954).

128. 15 C.F.R. § 379.11.

129. *Ihsan M. Beydoun*, 16 Fed. Reg. 3671 (1951). It is difficult to ascertain what occurred from the brief commentary in the denial order. It is likely the parties came to an agreement whereby Beydoun dropped his suit, and the regulations were amended so that jute bags moving in transit through the United States could be exported without a license. Beydoun received his jute but was permanently denied all export privileges. The Government may have settled out of court in order to avoid losing in court.

130. Carrier will not be liable for loss arising from arrest or restraint of princes. 49 Stat. 1210 (1936), 46 U.S.C. § 1304(2)(g) (1952).

131. 1953 Am. Mar. Cas. 1510 (Hong Kong Sup. Ct.).

goods to a Chinese buyer following imposition of the American embargo. After the ship had sailed from San Francisco, but before it arrived at Hong Kong, the United States Government issued orders prohibiting American vessels from discharging at a foreign port goods destined for buyers in Communist countries.<sup>132</sup> The goods were unloaded before the ship was aware of the order, but the godown (warehouse) withheld delivery on orders of the carrier.<sup>133</sup> The Supreme Court of Hong Kong, affirming the decision of the trial court, said the bill of lading, which provided for United States law, covered only the contract of carriage, which ended with discharge of the goods. After that, the bill of lading survived only as a document of title. Both the Carriage of Goods by Sea Act<sup>134</sup> and regulation T-1 use the word "discharge," which the court, following the principle that foreign law should be interpreted as restrictively as possible, said referred to unloading and not to delivery. Therefore, United States law could be applied only to the question of the right to forbid unloading and not to delivery.<sup>135</sup>

The court's decision hinged on its interpretation of "discharge," a restrictive interpretation, but one which agrees with the precise wording of the regulation.<sup>136</sup> Both American and British courts have held discharge refers to the moment the goods leave the ship's tackle, and therefore not to delivery.<sup>137</sup> Having found the coverage of the bill of lading ended with unloading the goods, the court was then able to say that as it applied no longer, the restraint of princes applied no longer. The carrier's refusal to deliver was an attempt to retrieve its previous error. The parties had not provided for this occurrence, and therefore the carrier was not protected. The buyer was given a judgment for the contract price plus agreed damages.

A nation can maintain control over its national vessels at all times. An order by a government to a vessel flying its flag will not be ques-

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132. 32A C.F.R. 209, reg. T-1 (1958).

133. The godown was joined as a defendant, but the court expressed no opinion as to whether it was the agent of the carrier.

134. 49 Stat. 1208 (1936), 45 U.S.C. §§ 1300-15 (1952).

135. This may be explained on the ground that the court thought the parties "intended" Hong Kong law to govern this aspect, the contract not expressing their intention on its face.

136. "No person shall discharge from any such [U.S. flag] ship . . . any such commodity [on Positive List] . . . at any such port [Hong Kong or Macao] . . . unless a validated export license . . . has been obtained for the shipment. . . ." 32A C.F.R. 209, reg. T-1, § 1 (1958).

137. *Remington Rand, Inc. v. American Export Lines, Inc.*, 132 F. Supp. 129, 137 (S.D.N.Y. 1955); *Federal Ins. Co. v. American Export Lines, Inc.*, 113 F. Supp. 540 (S.D.N.Y. 1953) (act does not apply when cargo is on a lighter). Discharge is completed when the goods are on the lighter when all goods to be unloaded have in fact been unloaded. *Lindsay Blee Depots, Ltd. v. Motor Union Ins. Co.*, 37 Lloyd's List L.R. 220 (K.B. 1930).

tioned by a court.<sup>138</sup> It is submitted that an order by the United States Government to one of its flag vessels not to deliver the cargo to the consignee should protect the ship from liability.<sup>139</sup> How far such an order should be permitted to extend, however, is a different matter. After the goods have been unloaded, performance is involved. If the consignee has the bill of lading, it would seem he is entitled to immediate delivery of the goods, even though it would be illegal by the law of the ship's flag. If the goods have been exported from the United States, the consignee's bill of lading will presumably stipulate United States law. A British court would probably give effect to such a provision so that even though the goods are in England, and the consignee is the acknowledged owner, the law of the contract as agreed by the parties forbids delivery to him.<sup>140</sup> On the other hand, if the goods have been exported from somewhere other than the United States, such transaction being a violation of the Transaction Controls,<sup>141</sup> and the parties have not stipulated American law, the court will have to decide what law the parties intended to govern. No matter what the answer to this question may be, a British court would probably construe the restraint as a restraint of princes, relieving the ship of liability under that clause in the bill of lading unless to do so would be contrary to public policy under the law of the forum.<sup>142</sup>

The trial court in the *American President Lines* case<sup>143</sup> found that the American orders were political in the sense that they were directed against designated countries, but not in the sense that that ground alone would be a reason for not enforcing them here. Although he did not hold on this ground, the trial judge said,

"I have reached the opinion that these orders and regulations are indeed confiscatory against those subject to the jurisdiction of the Courts in Hong Kong whose property may be refused to them,

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138. *Earn Line S.S. Co. v. Sutherland S.S. Co.*, 254 Fed. 126 (S.D.N.Y. 1918), *aff'd sub nom. The Claveresk*, 264 Fed. 276 (2d Cir. 1920). *But see* *A/S Tallinna Laevauhisu v. Tallinn Co.*, 175 L.T.R. (n.s.) 285 (K.B. 1946). See also *Aubert v. Gray*, 3 B.&S. 163, 122 Eng. Rep. 62 (Ex. 1862) (requisition of vessel by its government); *Miller v. Law Acc. Ins. Co.*, [1903] 1 K.B. 712 (C.A.) (order by local government at port of disembarkation preventing unloading).

139. *See Furness, Withy, & Co. v. Rederiaktiebolaget Banco*, [1917] K.B. 873.

140. *Accord, Kahler v. Midland Bank, Ltd.*, [1950] A.C. 24 (1949). *But see* *Loeb v. Bank of Manhattan Co.*, 18 N.Y.S.2d 497 (Sup. Ct. 1939).

141. 31 C.F.R. § 505 (Supp. 1958); see text accompanying note 47 *supra*.

142. *Cf. British Nylon Spinners, Ltd. v. Imperial Chem. Indus., Ltd.*, [1955] Ch. 37 (1954), where Danckwerts, J. upheld a British contract between British parties condemned by an American court on the ground there was no evidence that the object of the contract was to do anything illegal by American law, or that the plaintiff was a party to the conspiracy.

143. *China Mut. Trading Co. v. American President Lines, Ltd.*, 1953 Am. Mar. Cas. 709, *aff'd, id.* at 1510 (Hong Kong Sup. Ct.).

as in the present case for instance, with no provision at all,—in so far as the documents before me go—either for restitution or compensation.”<sup>144</sup>

Where foreign legislation purports to expropriate property situated outside the country without compensation, it will not be given effect in British courts, no matter what is the reason for the taking.<sup>145</sup> The compensation must be both adequate and prompt in order to save a decree from being confiscatory.<sup>146</sup> Foreign confiscatory legislation will be recognized in England if the property is situated within the territorial limits of the confiscating state at the time of the decree. The nationality of the owner is generally not relevant.<sup>147</sup>

These cases are to be distinguished from those involving a governmental order affecting but not vesting title to the property of private citizens, such as foreign exchange laws. Such orders are not strictly confiscatory as the owner remains beneficial owner of the property in question; the problem is whether he can obtain control or possession of it.<sup>148</sup> They are usually recognized by courts, even though partially confiscatory, as within the legitimate power of government to act in the general welfare.<sup>149</sup> But even if such orders are not confiscatory, and are in accord with English public policy, there is good authority that they will not be given extraterritorial effect.<sup>150</sup>

It is not really appropriate to characterize a government order to the carrier to deliver the goods when the consignee presents the bill of lading as confiscatory action. Even though the consignee has already paid for the goods, he has a right to have his money refunded, and

144. *Id.* at 713. The court sitting en banc on appeal expressed no opinion on this ground. *Id.* at 1517.

145. *Bank voor Handel en Scheepvaart v. Slatford*, [1953] 1 Q.B. 248, *rev'd in part on other grounds*, *id.* at 279 (C.A.). See also *State of Netherlands v. Federal Reserve Bank*, 201 F.2d 455 (2d Cir. 1953), construing same Dutch decree. *But see Anderson v. N.V. Transandine Handelmaatschappij*, 289 N.Y. 9, 43 N.E.2d 502 (1942), where Lehman, C.J. held the same decree was not confiscatory, but that the State became trustee for the true owners and therefore it did not offend the public policy of New York.

146. *Anglo-Iranian Oil Co. v. Jaffrate*, [1953] 1 Weekly L.R. 246, 253 (Aden Sup. Ct.); see 7 HALSBURY, LAWS OF ENGLAND 9 (3d ed. 1954).

147. *Ricaud v. American Metal Co.*, 246 U.S. 304, 310 (1918); *Re Helbert Wagg & Co.*, [1956] 1 All E.R. 129, 139 (Ch. 1955) (see discussion of cases therein).

148. See *Naamloze Vennootschap Suikerfabriek "Wono-Aseh" v. Chase Nat'l Bank*, 111 F. Supp. 833 (S.D.N.Y. 1953); *Dix v. Bank of California Nat'l Ass'n*, 113 F. Supp. 823 (N.D. Cal. 1952), *aff'd mem. sub nom. Dix v. Pineda*, 205 F.2d 957 (9th Cir. 1953); *cf. Perutz v. Bohemian Bank*, 304 N.Y. 533, 110 N.E.2d 6 (1953).

149. There is no recognized principle that confiscation without adequate compensation is per se a ground for refusing recognition to foreign legislation. *Re Helbert Wagg & Co.*, [1956] 1 All E.R. 129, 140-41 (Ch. 1955).

150. 7 HALSBURY, LAWS OF ENGLAND 283 (3d ed. 1954).

hence cannot claim confiscation although in certain instances this right may be subject to American foreign exchange controls.<sup>151</sup>

Where the goods are aboard a non-American ship, the problem is less easy of solution. Forfeiture proceedings may be brought against such a carrier if it knowingly carries goods out of the United States in violation of law. A ship which returns to the United States on another voyage could be seized if it had previously violated the law.<sup>152</sup> The availability of this sanction may make foreign shipowners more co-operative if their ships move regularly through United States ports. If the Bureau of Foreign Commerce issues a stop order to such a carrier there is greater likelihood of it being obeyed.<sup>153</sup>

If the carrier proceeds to its port of destination, a suit by the consignee would be more likely to succeed in the case of a foreign carrier than in a case where the vessel flies the United States flag. Neither the ship nor its owners presumably would be subject to American jurisdiction. A British court might conclude that the parties did not intend American law to cover anything but carriage, and that performance or delivery was to be governed by the law of the place of performance.<sup>154</sup>

Under British law performance is governed by the proper law of the contract, and not by the *lex loci solutionis*, which extends only to the mode or method of performance when interpreted not to change the substantive or essential conditions of the contract.<sup>155</sup> Thus, if American law were the proper law of the contract, whether or not delivery was to be made should be governed by that law.

If the government does not act, the right of the shipper to prevent delivery is extremely limited and appears to have no application here. The shipper would not have the right of stoppage *in transitu*, as this is a security arrangement for his protection only against the buyer's insolvency, and is not designed to protect him against other types of breach of contract.<sup>156</sup>

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151. 31 C.F.R. § 500.201 (Supp. 1958). *But see* *Nam Sun Trading Co. v. Andersen, Meyer Co.*, 35 Hong Kong L.R. 113 (1951).

152. 15 C.F.R. § 381.1(b).

153. 15 C.F.R. § 379.11. See *N.Y. Times*, Aug. 27, 1955, p. 30, col. 8, for a case where a Japanese carrier returned goods to the United States aboard a different vessel. See also *K. Burgi-Tobler & Co.*, 22 Fed. Reg. 1343, 1344 (1957).

154. *Boucher v. Lawson*, Cas. t. Hard. 85, 95 Eng. Rep. 53 (K.B. 1734); *Pellecat v. Angell*, 2 C.M. & R. 311, 150 Eng. Rep. 135 (Ex. 1835); *Sharp v. Taylor*, 2 Ph. 801, 41 Eng. Rep. 1153 (Ch. 1849).

155. *Bonython v. Australia*, [1951] A.C. 201, 220; *cf.* *Mayor of Auckland v. Alliance Assur. Co.*, [1937] A.C. 587, 606 (P.C.). See Note, 18 MODERN L. REV. 405 (1955).

156. See SCRUTTON, *CHARTERPARTIES* 208 (16th ed. 1955); SCHMITTHOFF, *THE EXPORT TRADE* 52, 55-58 (2d ed. 1950).



If the exporter discovers that the consignee is going to divert the goods contrary to United States law and to the ultimate destination statement in the bill of lading, he may treat the contract as broken, assuming the statement is a substantial term of the contract. How much such a breach would be worth to the exporter in an action for damages against the consignee is highly speculative, but the figure would probably not be more than nominal. By treating the contract as broken, however, the exporter could order the carrier not to deliver. But if the consignee has already made a bona fide negotiation of the bill of lading to a third party, the exporter loses all right of control over the goods.<sup>157</sup>

If the carrier does refuse to deliver to the consignee named in the bill of lading, his position is similar to that *supra*, except that this is not an act of State but simply a command by one party. It is doubtful if the carrier would be protected in a suit by the buyer for nondelivery if there is no specific clause in the contract. The carrier could raise the claim that diversion of goods would make delivery illegal by American law, but if there is no term relieving him of liability, the question would be whether the court would construe the contract as providing by implication for such a defense. If it does, a British court would doubtless hold the parties, including the buyer, bound by it. But if the parties intended performance to be governed by the law of the place of performance, the fact that United States law required this clause against diversion would not be relevant.<sup>158</sup>

*Liability of Consignee for Refusal To Re-Export From  
"Ultimate Destination"*

If it appeared that goods landed in a foreign country were going to be re-exported contrary to the statements made to the Bureau of Foreign Commerce, and the consignee in the foreign country were neither the American exporter nor another American, the United States Government could order him not to deliver the goods for re-export. The particular export license might be revoked so that further handling of the goods would be illegal by American law; the consignee's export privileges could be suspended, which would automatically cancel any licenses on which his name appeared. The question arises, however, whether, assuming the law of the foreign country did not bar export of these goods, possible action by the United States Government against an American consignee would be a valid defense to a suit for non-delivery by his purchaser.

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157. *Lickbarrow v. Mason*, 5 T.R. 683, 101 Eng. Rep. 380 (K.B. 1794).

158. *Vita Food Prods., Inc. v. Unus Shipping Co.*, [1939] A.C. 277 (P.C.).

The leading English case is *Kleinwort, Sons & Co. v. Ungarische Baumwolle Industrie Aktiengesellschaft*.<sup>159</sup> The plaintiff accepted three bills of exchange drawn by the defendant bank payable in three months in London, the contract being arranged by letters. Some time later the defendant notified the plaintiff that it would be able to cover the bills only if Hungarian foreign exchange restrictions permitted. The court found the defendant liable, holding first that the foreign exchange restrictions were not part of the contract, and second they would not constitute a valid defense anyway. The contract was to be performed in England and the proper law was English law; nothing was required to be done in Hungary. If the money were to have been paid in Hungary, Hungarian law would have governed the mode of performance, but in this case performance was not unlawful at the place of performance.<sup>160</sup> The court distinguished two prior cases<sup>161</sup> on the ground that in both performance was unlawful by the law of the country where performance was to take place.<sup>162</sup>

In an earlier case the Judicial Committee of the Privy Council ordered a British carrier to pay a rebate specified in a contract of carriage between Trinidad and New York, although such payment of rebates had been declared illegal by Act of Congress. Lord Parmoor could find no reason why the contract should not be enforced although contrary to the *lex loci contractus*. It was valid by its proper law, English law, and made between two Britons.<sup>163</sup>

If the proper law of the contract is found to be the law by which the contract is claimed to be illegal or unenforceable, a different result may ensue. The House of Lords distinguished the *Kleinwort* case in *Zivnostenska Banka Nat'l Corp. v. Frankman*<sup>164</sup> in holding a Czechoslovakian bank not liable to deliver securities in London, even though both parties and the securities were in England. The bank had stipulated that the place of performance was to be the place of the bank's branch which had carried out the transaction of purchase. This re-

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159. [1939] 2 K.B. 678 (C.A.).

160. Cf. *In re Sik's Estate*, 205 Misc. 715, 129 N.Y.S.2d 134 (Surr. Ct. 1954).

161. *De Beeche v. South Am. Stores, Ltd.*, [1935] A.C. 148; *Ralli Bros. v. Compania Naviera Sota y Aznar*, [1920] 2 K.B. 287 (C.A.).

162. For an American case holding that the law of place of performance controls matters relative to illegality and impossibility, see *Central Hanover Bank & Trust Co. v. Siemens & Halske Aktiengesellschaft*, 15 F. Supp. 927 (S.D.N.Y.), *aff'd per curiam*, 84 F.2d 993 (2d Cir.), *cert. denied*, 299 U.S. 585 (1936).

163. *Trinidad Shipping & Trading Co. v. G. R. Alston & Co.*, [1920] A.C. 888 (P.C.); see *British Nylon Spinners, Ltd. v. Imperial Chem. Indus., Ltd.*, [1955] Ch. 37 (1954).

164. [1950] A.C. 57 (1949).

ferred here to the head office in Prague; therefore Czech law was the proper law of the contract and of its performance. In order to perform, the Czech bank would have to violate Czech law in Czechoslovakia.

In *Kahler v. Midland Bank, Ltd.*,<sup>165</sup> decided the same day, the Lords split on a similar situation. The plaintiff's Czech predecessor had purchased securities in London held at a London bank in the name of the Czech bank. The majority held the parties intended Czech law to be the proper law of the contract, and by that law the plaintiff (bailor) was not entitled to immediate possession, although his absolute beneficial ownership was admitted. Lord Normand noted that but for the proper law as found by the court, giving plaintiff possession would not involve an act in a foreign country unlawful by its law; there would be an *in rem* judgment if the plaintiff could have shown his right to immediate possession.<sup>166</sup>

The American party would not be able to withhold delivery of the goods on order of the American Government and successfully defend a breach of contract suit on the ground of impossibility of performance. The American law does not affect the performance of the contract because American law is not the proper law, nor is it the law of the place of performance. On the other hand, if the court found American law were the governing law intended by the parties, the American seller would be in a better position. In the latter situation, however, it might well be contended that performance was to take place in England, and therefore English law was intended to govern the performance.<sup>167</sup> The answer to this would be to insert a specific clause stipulating American law as was done in the *Frankman* case.

Basically, however, the question involved is how far do American export controls extend, or in other words, when are the goods free from American control? There must come a time when American law ceases to have any effect.<sup>168</sup> The most logical time appears to be when the

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165. [1950] A.C. 24 (1949).

166. Two judges dissented on the ground that English law should govern as the law of the place of performance. For a similar result, see *Naamloze Vennootschap Suikerfabriek "Wono-Aseh" v. Chase Nat'l Bank*, 111 F. Supp. 833 (S.D.N.Y. 1953). See also *Nam Sun Trading Co. v. Anderson, Meyer Co.*, 35 Hong Kong L.R. 113 (1951), where, following frustration of a contract by the American embargo on shipments to China, the Hong Kong court rejected the American seller's argument that it was an implied term of the contract that refunds be made where the deposits were paid, *i.e.*, New York, and therefore frozen by Treasury Department regulations. The court said it was only "natural" that refunds be made where the buyer carried on its business.

167. *Kahler v. Midland Bank, Ltd.*, [1950] A.C. 24, 43 (1949) (Lord MacDermott dissenting).

168. The Bureau of Foreign Commerce claims export controls follow the goods to their ultimate destination. *Sudexport and General Import Export Co.*, 22 Fed. Reg. 4512 (1957).

transaction in which the export of the goods occurred ends. After this point, the owner and possessor of the goods is not subject to the jurisdiction of the United States, and neither are the goods. Any contract he makes for the sale of the goods with anyone not in the United States will have no connection with the United States, so that United States law could not apply in any way.

Where the shipment is covered by a validated license, the ultimate consignee must be named, together with the ultimate destination and end-use. There, the transaction of carriage from the United States may be only the first link in the chain. The named consignee in the bill of lading may be only an intermediary, the one who is to reship the goods to the ultimate consignee who is known to the Bureau, but not to the exporter. Does American law extend over the second link of this transaction, which is actually the subject matter of a contract different from that between the exporter and the intermediate consignee? It is difficult to see how a court sitting in Britain would permit the arm of United States law to reach this situation, when the parties have not intended American law to govern, nor to do any act in the United States.<sup>169</sup> The difficulty of the *Frankman* case is inapplicable and the *Kleinwort* case should be followed.<sup>170</sup>

The indorsee of a bill of lading takes only what it is the intention of the parties to transfer to him by the indorsement and delivery of the document. Generally all rights and duties of the original shipper under the contract evidenced by the bill of lading are transferred to him.<sup>171</sup> One duty is not to divert the goods contrary to American law. If the indorsee then diverts the goods is there any remedy that can be pursued against him? He can be denied export privileges by administrative action by the Bureau of Foreign Commerce. Beyond that there is little that can be done except possibly a suit on the breach of the condition in the bill of lading.

If he has received the goods before diverting them, is the diversion a breach of his contract with the exporter? Assuming the latter has received payment for the goods, what further claim could he have over the consignee? He has been paid, and it no longer concerns him what happens to the goods unless the ultimate destination statement is of such substance that diversion would go to the root of the contract. However,

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169. "I may note in passing that the modern tendency is to deny extraterritorial validity to legislation, for example, on movables situate outside the state at the time of the legislation." *Re Helbert Wagg & Co.*, [1956] 1 All E.R. 129, 138 (Ch. 1955).

170. See *China Mut. Trading Co. v. American President Lines, Ltd.*, 1953 Am. Mar. Cas. 709, 715, *aff'd, id.* at 1510 (Hong Kong Sup. Ct.) (Foreign Assets Control regulations).

171. SCRUTTON, CHARTERPARTIES 194 (16th ed. 1955).

he may actually have some interest in future events. If it turns out the goods are actually about to be illegally (by American law) diverted and he had prior to shipment some suspicion that an unlawful diversion might occur, he may find himself under investigation by the Bureau of Foreign Commerce.<sup>172</sup> It would then be to his interest to attempt to call a halt to the second transaction abroad. He will find himself fortunate that English merchants prefer to deliver the goods to Eastern European buyers at a Western port rather than directly at a port in East Europe.<sup>173</sup> They will probably be sent to a free port like Antwerp or Rotterdam where transshipment may be made.<sup>174</sup> There will still be time for the United States Government to step in and attempt to stop the diversion by use of the Battle Act agreements.

Transactions between the foreign buyer and his purchaser would seem to be beyond the reach of American controls, except where two important requirements can be met which depend upon the question whether the goods to be sold are specific goods, and whether they have come into the hands of the foreign buyer.

Where the contract is for specific goods shipped from the United States, as would be intended where the transaction is accomplished by a negotiation of the bill of lading, an American order preventing delivery to the foreign buyer would raise a question of impossibility. The American order might be accompanied by a revocation of the license under which the goods were exported, thus annulling the legality of the contract of export. In such a situation, the foreign buyer would have a valid defense to a suit by his purchaser for breach of contract, the goods having been removed from the control of the parties by governmental action.<sup>175</sup>

The doctrine that supervening impossibility is no defense is no longer well taken, and if the parties have not provided in their contract for such occurrence, a court is likely to imply such a term. But in some areas the doctrine has survived with vigor to a more recent date. Although some of the more ancient cases are considered obsolete,<sup>176</sup> the New York courts have held more recently that in the absence of a provision for the contingency, a foreign embargo was not a defense to

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172. See *Willys-Overland Export Corp.*, 20 Fed. Reg. 4191 (1955).

173. See testimony in *Sphinx Export Co. v. Specialist Shippers, Ltd.*, London Times, May 21, 1954, p. 2, col. 7 (Q.B.).

174. See N.Y. Times, March 1, 1954, p. 1, col. 7; *Hearings Before the Senate Committee on Foreign Relations on East-West Trade*, 83d Cong., 2d Sess. 11 (1954); S. REP. NO. 944, 81st Cong., 1st Sess. 6 (1951).

175. Cf. McNAIR, *LEGAL EFFECTS OF WAR* 304 (3d ed. 1948).

176. *Sjoerds v. Luscombe*, 16 East. 201, 104 Eng. Rep. 1065 (K.B. 1812); *Blight v. Page*, 2 Bos. & Pul. 295, 127 Eng. Rep. 163 (C.P. 1801). See SCRUTTON, *CHARTERPARTIES* 13-14 (16th ed. 1955).

an action for breach of contract.<sup>177</sup> In *Tweedie Trading Co. v. James P. McDonald Co.*<sup>178</sup> a federal court held a carrier could recover from the charterer on a contract to transport laborers from Barbados to Panama even though the Barbados government had prohibited the embarkation of laborers.

The better view should be that an occurrence of this type ends the contract. When a ship arrived in port, but the local authorities refused to permit its cargo to be landed, the court viewed this as an impossibility on both sides. The ship could not land the cargo; the consignee could not send lighters to receive it.<sup>179</sup>

If American law were the proper law, or New York law (as *lex loci contractus*) governed, a British court would apply that law. It would then be clear that the contract would be illegal and unenforceable by its proper law. However, the bill of lading does not express this contract of sale but is merely a document of title. The buyer becomes duty bound to adhere to the terms of the bill of lading but he does not owe this duty to his seller, the importer. American law would not be the proper law of their contract.

The impossibility described would arise from the assumption of control of the goods by a government. This is not seen to be too different from the cases involving requisition, although here the government is not assuming control in order to use the goods itself, but to prevent the goods being used to its detriment. The importer should be excused from liability if delivery of the specific goods is prevented by the United States.<sup>180</sup> A distinction can be made if it is shown the importer was aware that this sale might arouse the ire of the United States; the importer, it could be said, entered the contract knowing the goods might not arrive because of government action, and therefore the risk of such occurrence should be on him.<sup>181</sup>

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177. *Vanetta Velvet Corp. v. Kakunaka & Co.*, 256 App. Div. 341, 10 N.Y.S.2d 270 (1939); *Thaddeus Davids Co. v. Hoffman-La Roche Chem. Works*, 178 App. Div. 855, 166 N.Y. Supp. 179 (1917); *Richards & Co. v. Wreschner*, 156 N.Y. Supp. 1054 (Sup. Ct.), *aff'd mem.*, 174 App. Div. 484, 158 N.Y. Supp. 1129 (1916).

178. 114 Fed. 985 (S.D.N.Y. 1902).

179. *Ford v. Cotesworth*, L.R. 5 Q.B. 544 (Ex. 1870); *cf. Cunningham v. Dunn*, 3 C.P.D. 443 (1878).

180. See *Ross T. Smyth & Co. v. W. N. Lindsay, Ltd.*, [1953] 2 All E.R. 1064 (Q.B.).

181. *Cf. Simeon v. Bazett*, 2 M. & S. 94, 105 Eng. Rep. 317 (K.B. 1813), *aff'd sub nom. Bazett v. Meyer*, 5 Taunt. 824, 128 Eng. Rep. 917 (Ex. 1814); *K. C. Sethia, Ltd. v. Partabmull Rameshwar*, [1950] 1 All E.R. 51 (C.A. 1949), *aff'd*, [1951] 2 Lloyd's List L.R. 89 (H.L.). If both parties were aware of the risk, it would depend upon whom the parties intended to take the risk. Where neither party was aware that a Portuguese export license was required, the House of Lords held the risk was on the British seller as only he knew the Portuguese supplier. *A. V. Pound & Co. v. M. W. Hardy & Co.*, [1956] 1 All E.R. 639 (H.L.).

The contract may, however, be for unascertained rather than specific goods. The foreign importer may have in mind a shipment for which he has already contracted, but the contract with his purchaser does not refer to these particular goods and merely mentions the commodity involved. Will it make any difference if it is understood the goods are to be of American origin?<sup>182</sup>

Both parties may know that the particular commodity can be obtained only from the United States, or the contract may specify "American" goods. If the commodity is then placed on the Positive List in the United States, it would be relevant whether the prohibition was to go into effect immediately or whether there was a period of grace.<sup>183</sup> If the latter were true, the foreign importer would have to show that he had used his best efforts to obtain the goods before the period expired, and if not successful, that he had applied for but could not obtain a validated license. Even if the prohibition were immediate, he would still have to show he could not obtain the license. In *Ross T. Smyth & Co. v. W. N. Lindsay, Ltd.*<sup>184</sup> export was permitted at the date of the contract under open general license. Before the seller had entered upon performance, the general license was revoked effective eleven days from the date of the contract, and export after that was to be allowed only under specific license. As the prohibition was not instantaneous, the seller was not excused, not having shown any attempt to ship the goods during the eleven days. Devlin, J. distinguished *In re Anglo-Russian Merchant Traders, Ltd.*,<sup>185</sup> where the prohibition was immediate. It may be noted that if the importer's United States export privileges were canceled after making this contract, he would be excused from performance because the prohibition would be instantaneous and complete, excluding all possibility of obtaining any license.

Where the goods are not specified as "American" and they can be obtained elsewhere, a fact both parties are aware of, the importer is not excused. Thus, if he has agreed to sell goods which he imports, and a foreign embargo cuts off his supply, the fact that he would have to pay a higher price does not excuse him from delivering domestic

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182. See Nisan Simon Cohen, 22 Fed. Reg. 3134 (1957), where the purchaser of goods of American origin was denied export privileges although he was not a participant in the original transaction of export and was not involved in any representations made to the Bureau of Foreign Commerce.

183. A thirty-day period of grace is permitted when a commodity is placed upon the Positive List. 15 C.F.R. § 373.65(b)(7) (Supp. 1958); see also *id.* § 373.70(b)(1). Some exceptions have been made, however, allowing no period of grace.

184. [1953] 2 All E.R. 1064 (Q.B.).

185. [1917] 2 K.B. 679 (C.A.).

product.<sup>186</sup> Conversely, if he has agreed to sell goods to a foreign buyer, but export of that commodity has been prohibited, he is not excused if he can supply it from another country.<sup>187</sup> Neither is he excused merely because performance of the contract becomes more difficult or unprofitable.<sup>188</sup>

These results are perfectly equitable; it is merely another way of saying that performance does not become impossible because one of two possible modes of performance becomes illegal.

As the transaction becomes more remote in relation to the United States, American export regulations will have less effect. They will be given effect if the proper law of the contract is American law, and the defaulting party will be protected if either he has so stipulated in the contract or a case of impossibility or frustration can be shown. The governmental order can be effective to prevent the goods reaching their destination, unless the order is found to be contrary to the public policy of the law of the forum, a doubtful result.

The right of the American party to prevent delivery on his own initiative, however, will probably not succeed. As to contracts made after the original exportation, a British court would probably not give effect to these laws unless the contract evidences an intention of the parties to be bound by them. The court could, however, apply an exception in favor of public policy and apply domestic principles of law.

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186. *Thaddeus Davids Co. v. Hoffman-LaRoche Chem. Works*, 178 App. Div. 855, 166 N.Y. Supp. 179 (1917); *accord*, *P. N. Gray & Co. v. Cavalliotis*, 276 Fed. 565 (E.D.N.Y. 1921), *aff'd mem.*, 293 Fed. 1018 (2d Cir. 1923).

187. *In re Anglo-Russian Merchant Traders, Ltd.*, [1917] 2 K.B. 679 (C.A.) (dictum).

188. *Brauer & Co. v. James Clark, Ltd.*, [1952] 2 All E.R. 497 (C.A.); *cf.* *Owners of Spanish S.S. Sebastian v. De Vizcaya*, [1920] 1 K.B. 332.